IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.13971 of 2007

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

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| **1** | Whether Reporters of Local Papers may be allowed to see the judgment ? | **NO** |
| **2** | To be referred to the Reporter or not ? | **NO** |
| **3** | Whether their Lordships wish to see the fair copy of the judgment ? | **NO** |
| **4** | Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? | **NO** |
| **5** | Whether it is to be circulated to the civil judge ? | **NO** |

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NADIAD MERCANTILE CO-OPERATIVE BANK LTD.
(IN LIQUIDATION) - Petitioner(s)
Versus
KIRITBHAI M PATEL - Respondent(s)

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Appearance :
MR HM PARIKH for Petitioner(s) : 1,
MR ASHISH M DAGLI for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 23/10/2007
ORAL JUDGMENT

(1) RULE. Learned advocate appearing for the respondent is directed to waive service of rule.

(2) The petitioner-Bank filed Lavad Suit No.1711 of 2003 before the Board of Nominees, Kheda against 13 defendants. The respondent herein was defendant No.8 in the said suit. The suit had been filed by the petitioner-Bank for recovery of a sum of Rs.2,32,37,144/- (Rupees Two crores Thirty Two lacs Thirty Seven thousand One hundred Forty Four only) from defendant No.1, the principal borrower, while the respondent herein (defendant No.8) was arrayed as one of the sureties. The petitioner-Bank had also moved application Exh.4 for attachment of properties before judgment, and one of the properties mentioned in Schedule-II to the said application admittedly belonged to the respondent.

(3) On 22.10.2003 the respondent filed written statement and in the written statement also requested for release of his properties bearing Revenue Survey Nos.199, 209 and 210/A of Village Raval, Taluka Vaghodia, Dist.

Vadodara.

(4) In the meantime, the suit had been transferred to Board of Nominees, Anand. On 17.04.2007 the Board of Nominees passed an order whereunder the respondent was directed to make payment of a sum of Rs.17,37,000/- (Rupees Seventeen lacs Thirty Seven thousand only) along with interest @ 18% and upon such payment being made the properties which were attached were directed to be released. The petitioner-Bank carried the matter in revision before the Tribunal. The Tribunal has placed reliance on provisions of Section 146 of the Indian Contract Act, 1872 (the Contract Act) and come to the conclusion that only thing that the Tribunal is required to consider while deciding revision application is whether the order made by the Board of Nominees suffers from any legal error. After stating thus the Tribunal has recorded a finding that the Board of Nominees has not committed any legal infirmity and hence, the revision application

need not be entertained.

(5) However, simultaneously the Tribunal has accepted the grievance made by the petitioner-Bank that Exh.24 filed by the respondent was not an application but written statement filed by the respondent i.e defendant No.8 in the suit filed by the Bank. However, the Tribunal further proceeds to state that because a request is made to vacate the interim relief and the petitioner-Bank has not filed any response thereto the Board of Nominees has passed the order and hence, without entering into technicalities, the order made by Board of Nominees has been upheld.

(6) On 12.06.2007 the following order came to be made by this Court while issuing notice:

> " Heard the learned advocate for the petitioner. The principal grievance of the petitioner is to the effect that both the Board of Nominees and the Tribunal have failed to consider the

true import of provisions of Section 128 of the Indian Contract Act, 1972, which stipulates that the liability of a surety is co-extensive with that of the principal debtor, and hence, absolving the respondent-surety on payment of a part amount is an incorrect proposition in law. NOTICE returnable on 03.07.2007. Direct service permitted."

(7) The learned advocate appearing for the respondent has submitted that even if applicability of provisions of Section 128 of the Contract Act cannot be disputed yet, there is no ground made out by the petitioner-Bank for obtaining an order of attachment before judgment in light of the requirements of provisions of Rule 5 Order XXXVIII of Code of Civil Procedure, 1908 (CPC). It was submitted that none of the ingredients of the said provisions are satisfied and the Board of Nominees could not have passed any order of attachment before judgment.

(8) It is not necessary to enter into any

discussion on the said aspect of the matter. That is an issue which has not been decided by any of the subordinate authorities and it is open to the parties to agitate the same in accordance with law.

(9) At this stage the learned advocate for the respondent states that the respondent shall make an application in this regard before the Board of Nominees and the Board of Nominees may dispose of the said application within a time bound schedule.

(10) It is left open for the respondent to move such an application in accordance with law and request the Board of Nominees for hearing of the said application. However, in light of provisions of Section 128 of the Contract Act the impugned orders made by the Tribunal and the Board of Nominees cannot be sustained and are hereby quashed and set aside. Both the authorities have failed to consider the provisions of Section 128 of the Contract Act

which fasten the liability on the surety vis-a-vis the principal borrower and the provision categorically stipulates that such liability is co-extensive. Section 146 of the Contract Act merely provides for liability of co-sureties to contribute equally. The said section does not override Section 128 of the Contract Act.

(11) It is necessary to reiterate that the Court has chosen not to enter into merits of the submissions made in relation to applicability or otherwise of Rule 5 Order XXXVIII of CPC and the said issue would be at large after an appropriate application is moved by the respondent before the Board of Nominees in this regard.

(12) The petition is accordingly allowed in aforesaid terms. Rule made absolute. There shall be no order as to costs.

Sd/-
[ D.A. MEHTA, J ]

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Bhavesh*